SUPREME COURT, U. S.

JAN 16 1975

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-873

JAMES PHILLIPS and CITIZENS STATE BANK OF VIOLA, KANSAS,
Petitioners,

vs

GRAF ELECTRIC, INC.,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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vs.

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

The petitioners, James S. Phillips and Citizens State Bank of Viola, Kansas, pray that writs of certiorari issue to review the opinions and judgments of the Supreme Court of the State of Kansas rendered in these proceedings on November 6, 1974, and November 25, 1974.

DECISIONS BELOW

The decisions of the Kansas Supreme Court, as yet unreported, appear in appendices A and B, infra, pp. A1, A2.

The decision of the District Court of Sedgwick County is unreported and appears in Appendix C, infra, p. A3.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

STATEMENT OF FACTS

Respondent obtained a default judgment against petitioner James S. Phillips, in the District Court of Sedgwick County, Kansas, in the amount of $111.76 on December 23, 1973 for an alleged debt. On September 11, 1974, said petitioner moved that the default judgment be set aside on the grounds that at the alleged "trial and hearing" of December 23, 1973 said petitioner was not given notice of said hearing and an opportunity to be heard. On September 30, 1974, said petitioner amended his motion to specifically make reference to violation of the due process clause of the Fourteenth Amendment. On October 4, 1974, the District Court ruled that "due process was not violated" (See Appendix C, infra, p. A3) and that hence the default judgment should not be set aside. On appeal to the Kansas Supreme Court respondent moved to dismiss the appeal on the ground that the Kansas Supreme Court lacked jurisdiction pursuant to K.S.A. 60-2102 (See Appendix D, p. A5) on the ground that the matter in controversy was less than $500.00; Petitioner Phillips responded that since the principal issue on the motion to set aside the judgment involved the Federal Constitution, dismissal would constitute in itself a violation of due process; that the State Supreme Court could not deny jurisdiction where a constitutional issue is raised.

On November 6, 1974, the Kansas Supreme Court dismissed the appeal (See Appendix A) and on November 25, 1974, said Court upon motion for rehearing denied

said request by petitioner. (See Appendix B). There is no dispute that refusal to set aside the judgment was a "final" judgment.

On October 12, 1974, respondent secured a subpoena against petitioner, Citizens State Bank, for the records of the bank account of petitioner, Phillips. Petitioner bank moved that the subpoena be quashed on the ground that such production would be unreasonable and oppressive inasmuch as the cost of production would exceed $4,000 and respondent failed to advance costs. On October 4, 1974, the above named District Court overruled said motion (See Appendix C); the Kansas Supreme Court dismissed the petitioner bank's appeal (See Appendix A) and denied a motion for rehearing. (See Appendix B).

QUESTIONS PRESENTED

1. Whether the denial of jurisdiction by the Kansas Supreme Court constitutes a violation of due process of law.

2. Whether a state Supreme Court may deny jurisdiction on appeal even though the principal issues involve the Federal Constitution.

3. Whether the Kansas Supreme Court's order should be reversed on the ground that petitioner's right to due process of law under the Fourteenth Amendment was violated by the state district court in not providing notice of the "trial" of December 23, 1973, and hence whether the Supreme Court erred in upholding the decision of the lower court which refused to set aside the default judgment.

4. Whether petitioner bank's right to due process was violated.

REASONS FOR GRANTING THE WRITS

1. The order of dismissal by the Kansas Supreme Court is inconsistent with the principle of fundamental fairness and is based on the erroneous notion that a state Supreme Court may deny jurisdiction even where the principal issues are whether there was a violation of the Federal Constitution: namely, whether notice and opportunity to be heard was provided petitioner Phillips; whether said procedure is a prerequisite to due process and whether petitioner bank's right to due process was violated. Under Kansas law there is an exception to the requirement of jurisdictional amount. Said exception comes into play whenever a Federal Constitutional question is involved. (See Appendix D, infra, p. A5). The Kansas Supreme Court has clearly evaded the federal constitutional issues and such practice has been declared impermissible by this Court. (See *Radio Station WOW* v. *Johnson*, 326 U. S. 120 (1945); *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, 274 U. S. 651 (1927).)

2. The Supreme Court's decision is contradictory to that of *General Oil Co.* v. *Crain*, 209 U. S. 221 (1908).

3. The Kansas Supreme Court's order of dismissal of petitioners' appeals was in effect a decision on the merits; petitioners asked the Supreme Court on rehearing to reconsider in light of the fact that said decision had the effect of upholding the trial court ruling that "due process was not violated" but such request was denied.

4. That petitioners' right to due process was violated by the state district court; that the state Supreme Court's order of dismissal is an evasion of the Federal Constitution which is repugnant to the federal system and represents a policy which strangles the right of poverty stricken debtors and others who are sued for less than $500.00.

5. This case involves a system of anti-Constitutional behavior which can only be ended by intervention of the guardian of our most cherished liberties: the United States Supreme Court.

CONCLUSION

WHEREFORE. petitioners pray that writs be granted.

Respectfully submitted,

JAMES S. PHILLIPS, SR.
3241 East Douglas
Wichita, Kansas
Counsel for Petitioners

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 47,704

James Phillips, Appellant,

v.

Graf Electric, Inc., Appellee.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellee to dismiss appeal.

Motion sustained and appeal DISMISSED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date November 6, 1974

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 47,704

Graf Electric, Inc., Appellee,

v.

James Phillips and Citizens State Bank, Viola, Kansas, Appellants.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for rehearing or modification on Appellee's motion to dismiss appeal is considered and DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date November 25, 1974.

APPENDIX C

IN THE
DISTRICT COURT OF SEDGWICK COUNTY,
KANSAS

CASE NO. C-28489
DIV. NO. 2

GRAF ELECTRIC, INC.,
Plaintiff,

-vs-

JAMES PHILLIPS,
Defendant.

JOURNAL ENTRY

NOW on the 4th day of October, 1974, the above entitled matter comes regularly on for hearing upon defendant's motion and amended motion to vacate the judgment; the motions filed herein to quash the subpoenas as issued to defendant and garnishee defendant, Citizens State Bank. The defendant and garnishee appeared by and through their attorney, James S. Phillips, Jr. The plaintiff appears by and through their attorney, Richard Dickson.

THEREUPON, counsel for plaintiff and defendant and garnishee attorney, argued the motions before the Court and the Court after reviewing the affidavit filed by defendant, on the 13th day of September, 1974, and all matters therein found that the judgment should not be vacated since defendant's right of due process was not violated; that there was no excuseable neglect on the part of defendant and that plaintiff was not required to give defendant

a three day written notice prior to the taking of judgment against defendant.

The Court further finds that the garnishee defendant, Citizens State Bank, must comply with the plaintiff's subpoena duces tecum and such compliance is not unreasonable and oppressive and that garnishee bank is not entitled to the advancement of the costs for the production of its records and books.

The Court further finds that defendant must comply with plaintiff's subpoena duces tecum with respect to records of accounts receivable in his law practice, provided such compliance does not violate confidential relations between attorney and client.

The Court further finds that plaintiff's subpoena with respect to defendant's Federal Income returns should be quashed.

IT IS SO ORDERED on this 4th day of October, 1974.

/s/ Howard Cline
Judge

Approved:

/s/ Christopher J. Redmond for
Richard Dickson
Attorney for Plaintiff

/s/ James S. Phillips, Jr.
James S. Phillips, Jr.
Attorney for Defendant and
Defendant Garnishee

APPENDIX D

K.S.A. 60-2102. Invoking supreme court jurisdiction. (*a*) *As of right.* The appellate jurisdiction of the supreme court may be invoked by appeal as a matter of right from:

(1) An order that discharges, vacates, or modifies a provisional remedy.

(2) An order that grants, continues, modifies, refuses, or dissolves an injunction, or an order that grants or refuses relief in the form of mandamus, quo warranto or habeas corpus.

(3) An order that appoints a receiver, or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or involving the tax or revenue laws, or the title to real estate, or the constitution of this state, *or the constitution, laws or treaties of the United States.* (Emphasis supplied)

(4) A final decision in any action except in an action to recover money, the amount in controversy must be in excess of five hundred dollars ($500). In any appeal or cross-appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable.

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

REPLY OF RESPONDENT IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

REPLY OF RESPONDENT IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

STATEMENT OF FACTS

On July 23, 1973, the respondent, Graf Electric, Inc., filed an action in the Court of Common Pleas, Sedgwick County, Kansas. A Summons and Complaint were served upon petitioner, James S. Phillips, the same day.

On August 6, 1973, a Journal Entry of Judgment was obtained against petitioner Phillips for failure to appear in the action. Petitioner appealed to the District Court of Sedgwick County, Kansas, on August 16, 1973, and petitioner filed an Answer to respondent's Complaint.

The matter was set for trial on December 27, 1973. Petitioner Phillips was fully aware of the date for trial, in that the administrative judge of the District Court of Sedgwick County, Kansas, had notified the petitioner by telephone as to said trial date. Petitioner failed to appear for trial and a default judgment was entered in respondent's favor.

An amended motion for vacating the judgment rendered was filed by petitioner Phillips on September 30, 1974. On October 4, 1974, the District Court overruled the motion to vacate the judgment and found that there was no violation of the due process clause to the United States Constitution.

Petitioner Phillips then appealed to the Kansas Supreme Court. Upon motion to dismiss by respondent for lack of jurisdiction, the Kansas Supreme Court dismissed the appeal. Petitioner moved for rehearing or modification of dismissal and such was denied by the Kansas Supreme Court.

On April 15, 1974, the respondent was granted an Order to garnish funds or property of the petitioner Phillips from the Citizens State Bank. On May 6, 1974, petitioner Citizens State Bank filed an Answer to the Order of garnishment to the effect that it held no property of petitioner Phillips.

On September 10, 1974, the respondent sent a Subpoena Duces Tecum to petitioner Citizens State Bank requesting all records held by the bank pertaining to petitioner Phillips. Petitioner Citizens State Bank moved to quash the Subpoena. On October 4, 1974, the District Court overruled the motion to quash and found that the Subpoena was not unreasonable or oppressive. Appeal was taken to the Kansas Supreme Court, and dismissed, and a motion for rehearing was denied.

REASONS FOR DENYING WRITS

The Supreme Court of Kansas, in its dismissal of petitioners Phillips and Citizens State Bank's appeal, did not violate due process. It has been consistently held by the United States Supreme Court that it will not review a State Court decision resting on adequate and independent non-federal grounds. (See *Radio Station WOW* v. *Johnson*,

326 US 120 (1945)). In this instance, the Kansas Supreme Court dismissed because of lack of appellate jurisdiction as provided in KSA 60-2102 (4). (See petitioners' Appendix D). The Kansas Supreme Court has upheld on various occasions the right of a state legislature to place limits on the amount in controversy for appellate jurisdiction. (See *Downham* v. *City Council of Alexandria*, 9 Wall 659 (1870)). Therefore, there was nothing fundamentally unfair concerning a dismissal of an appeal which failed to meet the jurisdictional amount required. The Kansas Supreme Court's decision rested on an adequate and independent non-federal grounds.

It is true that KSA 60-2102 (3) (See petitioners' Appendix D) provides for appellate jurisdiction in cases involving constitutional questions, however, the instant case did not involve a violation of the due process clause of the Constitution. Such was the finding of the District Court of Sedgwick County, Kansas. (See petitioners' Appendix C). The Kansas Supreme Court, by dismissing the appeal by petitioners Citizens State Bank and Phillips, not only found that appellate jurisdiction was lacking, but also found by implication that no substantial constitutional issue was involved. If the Kansas Supreme Court had felt that there was evidence in the record on appeal of a constitutional violation, no dismissal would have been entered.

The United States Supreme Court has many times refused to grant Certiorari simply because the petitioner had made an averment of a constitutional violation. A real and substantial constitutional question must be involved before Certiorari will be granted. (See *Sawyer* v. *Piper*, 189 US 154 (1903); *Wick* v. *Chelan Electric Co.*, 280 US 108 (1927).

The requirements of due process are satisfied if one has been given reasonable notice and a reasonable oppor-

tunity to be heard. (See *Simon* v. *Kraft*, 182 US 427 (1901); *Dohany* v. *Rogers*, 281 US 362 (1930)). In the instant case, petitioner Phillips was given more than adequate notice and an opportunity to be heard. Petitioner Phillips was notified by telephone, by the administrative judge of Sedgwick County, Kansas, of the date of the trial, which was set for December 27, 1973. Petitioner Phillips, being a member of the Kansas Bar, certainly knows the procedure if he is scheduled to appear in another matter at the same time as the instant case was scheduled. Having been given ample notice of the trial, petitioner Phillips merely chose to ignore it, prompting the Court to enter default judgment on its own motion.

The three-day notice, as required by KSA 60-255 (a) (See Appendix A) before a default judgment may be entered, was not required in the instant case because the attorney for the respondent did not intend to take a default judgment when he entered the court room on December 27, 1973. Rather, he was prepared to try the case on its merits. The Court, upon failure of petitioner Phillips to appear, entered the default judgment on its own motion.

Having been given ample notice and opportunity to be heard, it cannot be said that petitioner Phillips was denied due process of law

CONCLUSION

Wherefore, respondent prays that Writs be denied.

Respectfully submitted,

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Counsel for Respondent

APPENDIX A

KSA 60-255. Default. (a) Entry. Upon request and proper showing by the party entitled thereto, the judge shall render judgment against a party in default for the remedy to which the party is entitled. But no judgment by default shall be entered against a minor or incapacitated person unless represented in the action by a guardian, conservator or other legally authorized representative who has appeared in the action, or by a guardian *ad litem* appointed by the court. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state.